

A Noh Hyoung Seok v Perwira Affin Bank Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-02-1105
OF 2001

NIK HASHIM, AUGUSTINE PAUL JJCA AND ZAINUN ALI J
10 DECEMBER 2003

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Civil Procedure — Summary judgment — Triable issues — Dispute as to issue of fact — Whether amounted to conflict of evidence which required viva voce evidence in trial

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Civil Procedure — Summary judgment — Triable issues — Issue not raised in statement of defence or affidavit — Whether defendant precluded from raising issue

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This was the appellant's appeal against the decision of the learned judge in entering summary judgment against him. The appellant was a guarantor in respect of banking facilities granted by the respondent to the third defendant. The appellant contended that there were grounds of appeal that entitled him to be allowed unconditional leave to defend. The grounds related to, inter alia, the release of the appellant as a guarantor and penalty interest. With respect to the release of the appellant as a guarantor, the appellant had exhibited his letter to the respondent ('NHS-2') in which the appellant claimed that the respondent's officers had verbally confirmed his release as a guarantor. The respondent did not reply to NHS-2 and in the meantime, the appellant

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wrote another letter to the respondent to request for his release as a guarantor. The respondent merely stated in its affidavit that it did not agree to release the appellant. On the issue of penalty interest, the learned judge had ruled that since the appellant did not raise this issue in his statement of defence or in his affidavit, the appellant was precluded from raising it at all.

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Held, allowing the appeal:

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(1) There was clearly a conflict of evidence in regard to the release of the appellant as a guarantor. The learned judge's finding, in the light of an application under O 14 of the Rules of the High Court 1980 ('RHC'), was manifestly erroneous because a dispute as to an issue of fact, namely, whether there was a release of the appellant as a guarantor amounted to conflict of evidence which required viva voce evidence in a trial (see paras 26, 28).

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(2) At the stage when the appellant argued and challenged the validity of the penalty interest, no defence had been filed yet. In any case, it was open for the appellant to raise this issue based on the respondent's own documents filed in court. Moreover, in an application for summary judgment under O 14 of the RHC, the appellant can seek leave to defend by 'affidavit or otherwise'. Therefore, even if the appellant cannot point to a specific issue which ought to be tried, but if he could satisfy the court that there were circumstances that ought to be inquired into,

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the words 'affidavit evidence or otherwise' in O 14 r 4 of the RHC would have served this purpose. The language of O 14 r 4 of the RHC was unequivocal in its imperative that the appellant was able to raise

issues as defences even in the absence of a statement of defence or affidavit filed (see paras 44–45, 58, 63).

- (3) It was not the function of the trial judge in an application for summary judgment to delve into the merits of the case and decide whether the defendant was likely to succeed or fail. His function was merely to scrutinize the defence of the defendant and test it, inter alia, against the language of O 14 r 4 of the RHC to determine whether it was a plausible defence (see paras 61–62).

[Bahasa Malaysia summary]

Ini adalah rayuan perayu terhadap keputusan hakim yang bijaksana yang telah memasuki penghakiman terus terhadap beliau. Perayu merupakan seorang penggerenti berhubung kemudahan perbankan yang diberikan oleh responden kepada defendan ketiga. Perayu telah berhujah bahawa terdapat alasan-alasan rayuan yang memberikan beliau hak untuk dibenarkan mendapat kebenaran tanpa syarat untuk membela. Alasan-alasan tersebut berkaitan kepada, antara lain, pelepasan perayu sebagai penggerenti dan faedah penalti. Berkaitan pelepasan perayu sebagai penggerenti, perayu telah mengekshibitkan surat beliau kepada responden ('NHS-2') di mana perayu telah mendakwa bahawa pegawai-pegawai responden telah secara lisan mengesahkan pelepasan beliau sebagai penggerenti. Responden tidak menjawab kepada NHS-2 dan sementara itu, perayu telah menulis sepucuk surat lagi kepada responden untuk memohon pelepasan beliau sebagai penggerenti. Responden hanya menyatakan dalam afidavitnya bahawa ia tidak bersetuju untuk melepaskan perayu. Berhubung persoalan tentang faedah penalti, hakim yang bijaksana telah memutuskan bahawa memandangkan perayu tidak menimbulkan persoalan ini dalam pernyataan pembelaan atau dalam afidavit beliau, perayu telah dikecualikan untuk menimbulkannya langsung.

Diputuskan, membenarkan rayuan tersebut:

- (1) Adalah jelas terdapat konflik berkaitan pelepasan perayu sebagai seorang penggerenti. Penemuan hakim yang bijaksana, berdasarkan permohonan di bawah A14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), adalah salah kerana satu pertikaian berkenaan persoalan fakta, iaitu, sama ada terdapat pelepasan perayu sebagai penggerenti membentuk satu konflik keterangan yang memerlukan keterangan viva voce di satu perbicaraan (lihat perenggan-perenggan 26, 28).
- (2) Di peringkat di mana perayu berhujah dan mencabar kesahihan faedah penalti, tiada pembelaan telah difailkan. Dalam apa-apa kes, ia adalah terbuka kepada perayu untuk menimbulkan persoalan ini berdasarkan dokumen-dokumen responden sendiri yang telah difailkan di mahkamah. Tambahan pula, dalam satu permohonan untuk penghakiman terus di bawah A 14 KMT, perayu boleh memohon kebenaran melalui 'affidavit or otherwise'. Oleh itu, walaupun perayu tidak boleh mengutarakan satu persoalan spesifik yang patut dibicarakan, tetapi jika beliau boleh memuaskan hati mahkamah bahawa terdapat

- A** keadaan yang patut disiasat, perkataan-perkataan ‘affidavit evidence or otherwise’ dalam A 14 k 4 KMT telahpun merangkumi tujuan tersebut. Bahasa A 14 k 4 KMT adalah tidak taksa secara imperatif di mana perayu boleh menimbulkan persoalan tentang pembelaan meskipun dengan ketiadaan pernyataan pembelaan atau affidavit yang telah difailkan (lihat perenggan-perenggan 44–45, 58, 63).
- B** (3) Ia bukan fungsi hakim perbicaraan dalam satu permohonan untuk penghakiman terus untuk meneliti merit kes dan memutuskan sama ada defendan mungkin berjaya atau gagal. Fungsi beliau hanyalah untuk meneliti pembelaan defendan dan mengujinya, antara lain, terhadap bahawa A 14 k 4 KMT untuk menentukan sama ada ia adalah satu pembelaan yang munasabah (lihat perenggan-perenggan 61–62).]
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Notes

- For cases on summary judgments, see 2(3) *Mallal’s Digest* (4th Ed, 2001 Reissue) paras 6103–6173.
- D** For cases on summary judgments, see 1 *Halsbury’s Laws of Malaysia* (2002 Reissue) paras [10.6-048]–[10.6-057].

Cases referred to

- E** *Alliance (Malaya) Engineering Co Sdn Bhd v San Development Sdn Bhd* [1974] 2 MLJ 94 (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)
Banque de Paris v de Narav [1984] 1 Llyod’s Rep 23 (refd)
Burnes v Trade Credits Ltd [1981] 2 All ER 122 (refd)
D & C Bank Bhd v Pembangunan Rumah Pantai Sdn Bhd [1989] 2 CLJ 823 (refd)
- F** *Gissco Sdn Bhd v Blackgold Sdn Bhd* [1988] 2 MLJ 397 (refd)
Lin Securities (Pte) v Noone & Co Sdn Bhd (Klang Jaya Bahru Development Bhd, third party) [1989] 1 MLJ 321 (refd)
Penang Port Commission v Kanagawi s/o Seperumaniam [1998] 3 AMR 2778 (refd)
- G** *Ray v Newton* [1913] 1 KB 249 (refd)
Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim [1985] 2 MLJ 225 (refd)
Syn Lee & Co Ltd v Bank of China [1961] MLJ 87 (refd)
Tan Ah Tong v Perwira Habib Bank (M) Sdn Bhd [1998] 3 MLJ 778 (refd)

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Legislation referred to

Rules of the High Court 1980 O 14 r 4(1)

Appeal from: Suit No MTI–22–606 of 1998 (High Court, Shah Alam)

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RR Sethu (RR Sethu) for the appellant.

Chan Kok Keong (Chan & Assoc) for the respondent.

Zainun Ali J (delivering judgment of the court):

[1] This is the fourth defendant's appeal against the decision of the learned judge made on 29 September 1999 whereby judgment under O 14 was entered against the four defendants including the four defendant on the plaintiffs application (encl 21).

[2] In this appeal, having heard the submissions of both learned counsel for the appellant and the respondent and after having deliberated the matter, we came to a unanimous decision that the appeal has merits and accordingly we allowed the appeal. We now give our reasons.

[3] As a prelude, whilst it is true that a slew of authorities on an O 14 application have already filled the law reports, we are of the view that the implications of the issues raised may often be obscured at the expense of illuminating the significance of this summary power.

THE FACTS

[4] The appellant was a former director and shareholder of one MIL Electronics Sdn Bhd ('the company'). Both the second and third defendants were also directors of the company.

[5] The company had borrowed funds from the respondent amounting RM11,250,000 and the commercial credit facilities was RM3,000,000.

[6] The appellants sold all his shares in the company to third defendant in July 1997 and then left the company.

[7] Subsequently, the third and second defendant sold their shares to MOCCIS Trading Sdn Bhd, which later changed its name to MOCCIS Electronics Sdn Bhd (the first defendant).

[8] Meanwhile, the respondent continued the facilities already provided to the company.

[9] The second to fourth defendants are guarantors of the loans granted by the respondent to the company.

[10] The written guarantees by the third and fourth defendants were dated 10 December 1990, 11 September 1992 and 17 May 1995. It is the respondent's case that the second to fourth defendants guaranteed not merely as sureties but also as principal debtors, where the consideration sets out the payment on demand of all monies due and owing by the first defendant to the respondent including interest therein.

[11] When the first defendant defaulted in making payments on the due dates to the respondent despite demands, the respondent recalled the facilities and notified the first defendant of the revision of the interest rates on each of the outstanding facilities to 4% above the respondent's base lending rate per annum.

[12] The respondent through its solicitor issued letters of demand dated 23 January 1998 to the first defendant and dated 5 March 1998 to the second

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- A** to fourth defendants demanding from each of the defendants payments of all sums due and owing to the respondent.

[13] In the intervening period, there was a change in the shareholding structure of the first defendant. The facilities were allegedly given to the first defendant before the change in the shareholding.

- B** [14] It is the appellant's case that he was not involved in the financial side of the operation of the first defendant before the change, and that it was the third defendant who was responsible for the financial affairs of the first defendant.

- C** [15] The present proceeding was instituted by the respondent, suing the first defendant for sums allegedly due from the first defendant as the principal debtor and against the second, third and fourth defendants as guarantors.

- D** [16] From the cause papers, it is seen that the respondent's submission in relation to the second, third and fourth defendants draws no distinction as to the alleged liability of each of the defendants. The respondent proceeds as if all the three defendants are jointly and severally liable on the various guarantees relied on.

[17] It is the appellant's case that for the reasons advanced below, his case has to be treated separately from that of the second and third defendants.

- E** [18] The present appeal is therefore solely by the fourth defendant against the decision of the judge in chambers delivered on 29 October 2001.

- F** [19] In dismissing the appeal, the judge had, in our view, misinterpreted the platform of an O 14 application, as his main concern should be to see whether there are bona fide triable issues and not decide the application on the spot, especially when facts are in issue.

THE GROUNDS OF APPEAL

- G** [20] As amplified by the appellant, there are four grounds of appeal, which the appellant submits, entitles him to be allowed unconditional leave to defend. The grounds relate to:

- (i) notice of demand;
- (ii) release of guarantee;
- (iii) breach by plaintiff and effect; and
- (iv) interest rates.

- H** *Notice of demand*

- I** [21] This first ground of appeal, which refers to the validity of the notice of demand is a common issue which often resurfaces due to its significance in establishing a cause of action. We allowed submissions by both parties but made no ruling on this specific ground of appeal, since it is the fourth ground of appeal which arrests this court's attention in as much as giving this court material upon which to deliberate.

Release of guarantee

[22] With respect to the appellant's second ground of appeal, a flurry of letters had passed between the appellant and the respondent and its officers. Of significance is the letter of exh NHS-2 which was sent by the appellant stating that two credit officers (one Ms Lim and Encik Zulkifli) had verbally confirmed that the appellant was released from his liability as guarantor.

[23] The respondent however, chose not to reply to NHS-2 and gave no explanation for its failure to do so. In the meantime, the appellant wrote to the respondent requesting release as guarantor.

[24] However, the learned judge found the appellant's request for his withdrawal as a guarantor mystifying, since the learned judge said that it was pointless to seek the request if he had already been released earlier, as alleged by him.

[25] Given that the respondent's deponent, one Mahmud bin Bidin had denied that neither he, nor one Tan Kwee Hee had 'at anytime acknowledged or agreed to release the appellant,' a response by the respondent to NHS-2 may well support the appellant's version that there was in fact a release. To all these, the learned judge merely observed that:

The fourth defendant's contention is inherently improbable and contradicts his own letter of 13 November 1997 (exh NHS-2 of encl 22). I therefore rejected the claim of the fourth defendant that he was released as a guarantor by the plaintiff.

[26] We find that the learned judge had fallen into error here. Clearly there is a conflict of evidence in this regard, as a release can be oral. It is also a finding of fact, where consideration is not necessary. See *Tan Ah Tong v Perwira Habib Bank (M) Sdn Bhd* [1998] 3 MLJ 778, where the court ruled that:

It is manifest that the discharge may even be oral or be effective as a waiver or as an estoppel. Therefore the contention of the respondent bank that the discharge of a guarantee in order to be binding must be supported by consideration cannot, with respect, be accepted.

[27] In view of the respondent's third affidavit which merely states that the respondent did not agree to release the appellant, and in the absence of a supporting letter which rejects the request we find that this omission does not square with what Mr Tan Kwee Hee had apparently told the appellant.

[28] Thus, the judge's finding, in the light of an O 14 application is manifestly erroneous, since a dispute as to an issue of fact, namely, whether there was a release, amounts to a conflict of evidence which requires viva voce evidence in a trial. In making such a finding of fact on a conflict of evidence, we find that the learned judge had misinterpreted the principles of release as well as the limitation and parameters of an O 14 application, which we will deal with latterly.

Breach by plaintiff and effect

[29] The appellant's third ground of appeal rests on the premise that since he had left the company in June 1997, he is absolved from liability even if

- A** there was a breach to the agreement as alleged by respondent. Regard might be had to cl II of the agreement which explains the status of the guarantor in the event of a change in the constitution of the borrowers.

[30] The learned judge ruled that:

- B** ... There has been no breach by the plaintiff of the provision of debenture, as alleged by the fourth defendant. Being a bank, the plaintiff does not have the necessary control over the first defendant's shareholding. As a result of the plaintiff not being able to exercise such control, it is the first defendant who instead agrees and undertakes not to cause any change in its equity or composition. Therefore if such an event occurs, it is the first defendant that is in breach of the various agreements with the plaintiff and not the plaintiff.
- C**

[31] However, it is the respondent's contention that the change in shareholding does not affect the appellant's liability as guarantor.

- D** **[32]** Be that as it may, we find that at this point, it is unnecessary for us to consider whether the agreement had been terminated or not. We are only concerned with the learned judge's failure to consider the points raised at this stage for the reasons given by him.

Interest rates

- E** **[33]** The fourth ground of appeal bears upon the question of the respondent's variation of the interest rates in which the appellant disputes the alleged notices of variation.

- F** **[34]** The respondent made claims for interest at several different rates above the base lending rates and the legality of these claims were vigorously challenged by the appellant. As could be extracted from the records, the principal loan documents set out the interest rate at 1% and 2% above the Base Lending Rate (BLR) and the said documents also provide for the increase in rates and for penalty interests and damages etc.

- G** **[35]** It is the appellant's case that the respondent bears the onus of proving that the interest rates claimed are proper and legal.

- H** **[36]** In challenging the validity of the penalty interest the appellant, inter alia, subscribed to the authority found in *D & C Bank v Pembangunan Rumah Pantai Sdn Bhd* [1989] 2 CLJ 823 which insisted on the defendant being given a written notice of such amendment (when imposing additional terms and conditions).

[37] The appellant also relied on *Burnes v Trade Credits Ltd* [1981] 2 All ER 122, which held that the unauthorized variation of the interest rate would also operate to discharge the guarantor.

- I** **[38]** We find that the learned judge failed to address the issue of penalty interest in relation to the defence put up by fourth defendant and instead his Lordship observed starkly, that:

This is the first time the fourth defendant is *raising this issue which was not raised in his statement of defence or in his affidavit*. I therefore rejected this argument. (Emphasis added.)

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[39] By the said ruling above, the learned judge is effectively saying the appellant by having failed to raise the issue (of penalty interest) in his defence or in his affidavit, is thus precluded from so raising it now, or ever.

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[40] The question is: What is the legal position on this point?

[41] For a start, we would say that the effect of an O 14 proceeding has been pronounced time and again, bearing in mind the special nature of this jurisdiction. In a dissenting judgment, Gan Chit Tuan J (as he then was) in *Bank Negara Malaysia v Mohd Ismail and Ors* [1992] 1 MLJ 400 admirably captured the essence of an O 14 proceeding thus:

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... The scope of Order 14 proceeding meant for cases which are virtually uncontested or uncontestable is now determined by the Rules of the High Court 1980. Generally where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend.

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[42] Then again, in the words of Thomson CJ in *Syn Lee & Co Ltd v Bank of China* [1961] MLJ 87:

... there may have been some slight misapprehension on the part of the trial judge as to the proper approach. ... we have to remember the defendants as in the interest of the plaintiffs. It is in the interest of the plaintiffs that they should be able to get prompt judgment when there is no real defence. But on the other hand it is in the interests of the defendants in such cases that plaintiffs should be able to get judgment but only expeditiously not economically.

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[43] This view is fortified by later cases such as that of *Lin Securities (Pte) v Noone & Co Sdn Bhd* [1989] 1 MLJ 321, where the court observed that:

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... the issue at an Order 14 application is whether the defendant has a defence and not whether the statement of defence provides him with a defence.

[44] In the instant case, at the stage when the appellant argued and challenged the validity of the penalty interest, no defence had been filed. However as case laws would have shown, it is open to the appellant to raise this issue, based as it were, on the respondent's own documents filed in court.

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[45] Moreover the appellant, in an O 14 application can seek leave to defend by 'affidavit or otherwise' (O 14 r 4(1)).

[46] Order 14 r 4(1) reads:

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Leave to defend (Order 14 rule 4)

(1) Defendant may show cause against an application under rule 7 by affidavit or otherwise to the satisfaction of the court.

[47] Order 14 r 4(1) provides a situation where, once the plaintiff has made out a prima facie case, the onus shifts to the defendant to show cause why the judgment should not be entered against him 'by affidavit or otherwise.'

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- A** [48] In the instant case, the appellant raised the issue of the validity of the penalty interest as he gleaned them from the respondent's own documents filed in court.
- [49] In the context of O 14 r 4, the court will not decide the O 14 application by weighing both plaintiffs and defendant's affidavit but must look at the matter in its entirety to ascertain whether the defendant has a real or bona fide defence .
- B**
- [50] Just suppose the defendant's assertion in the affidavit is not credible, there is no fair or reasonable probability of the defendant having a defence See *Banque de Paris v de Narav* [1984] 1 Lloyd's Rep 23 and *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim* [1985] 2 MLJ 225
- C** where from the facts and circumstances of the case as a whole, the defendant had failed to show a bona fide defence to the claim.
- [51] Order 14 r 4 envisages a situation where a defendant may show cause 'otherwise' by a preliminary objection, for example, that the case is not within the order or that the statement of claim or the affidavit is defective. Such objection is not required to be supported by an affidavit.
- D**
- [52] The defendant may also show cause by serving a full and bona fide defence setting out triable issues before the issue of the summons: see Gill CJ's observation in *Alliance (Malaya) Engineering Co Sdn Bhd v San Development Sdn Bhd* [1974] 2 MLJ 94.
- E**
- [53] Likewise, the defendant's failure to file an affidavit in opposition does not preclude the court from considering the defence as a mode of opposition to the plaintiffs application (see *Gissco Sdn Bhd v Blackgold Sdn Bhd* [1988] 2 MLJ 397.
- F**
- [54] In keeping with the exacting standards to be observed before such summary powers can be invoked in an O 14 application, the defendant is entitled to show, over and above what has been pleaded in the statement of defence that he has other defences.
- G**
- [55] In *Lin Securities (Pte) Ltd v Noone & Co Sdn Bhd (Klang Java Bahru Development Bhd* [1989] 1 MLJ 321, the defendants sought to rely on the ground that the contract in question was governed by Singapore law, which was not pleaded in the statement of defence. The court held that the point raised amounted to a question of law and the matter could not be disposed off summarily. The defendant was duly given unconditional leave to defend.
- H**
- [56] In another case, *Ray v Newton* [1913] 1 KB 249, the defendant's affidavit was not conclusive and the defendant was not prevented from relying on defences not raised in the affidavit.
- [57] Thus in an application such as this, it is certainly open to the defendant to raise his defence even in the absence of a statement of defence and affidavit filed, and this is especially compelling when it is a question of law. In this case such question of law was discernible from the respondent's own documents.
- I**

[58] Under this rule (O 14 r 4) even if the defendant cannot point to a specific issue which ought to be tried, but the defendant nevertheless satisfies the court that there are circumstances that ought to be inquired into, then the words 'affidavit evidence or otherwise' in this rule would serve this purpose.

[59] We might mention here that counsel for the respondent cited *Penang Port Commission v Kanawagi s/o Seperumaniam* [1998] 3 AMR 2778, and argued that in an O 14 proceeding, the appellant may show triable issues by 'affidavit evidence or otherwise' only in matters raised in his defence and is precluded from raising it outside of this parameter, for it would then amount to giving evidence from the bar.

[60] We read the said authority cited, but were unable to find anywhere in the judgment of the learned judge of such a ruling by him. Thus, we find that respondent counsel's submission above is unsustainable.

[61] For completeness, it is also not the function of the trial judge in an O 14 application to delve into the merits of the case and decide whether the defendant is likely to succeed or fail.

[62] His is merely to scrutinize the defences of the defendant and test them inter alia, against the language of O 14 r 4 to determine whether they come up to scratch, as a plausible defence. He must also bear in mind the cautionary words of Thomson CJ, in *Syn Lee & Co Ltd v Bank of China* [1961] MLJ 87, which place importance on the ruling that as long as the defendant raises even one issue for trial, the plaintiffs case will necessarily disintegrate.

[63] Thus it bears emphasis here that the language of O 14 r 4 is unequivocal in its imperative that the defendant is able to raise issues as defences even in the absence of a statement of defence or affidavit filed.

[64] For the reasons above, we allowed this appeal and order that the appellant be refunded his deposit.

Appeal allowed.

Reported by Lim Lee Na